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# Supreme Court of the United States

**OCTOBER TERM, 1905.**

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## No. 368.

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MARY MABEL ROGERS, APPELLANT,

*vs.*

HENRY H. PECK AND WILSON S. LOVELL,
APPELLEES.

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## BRIEF FOR APPELLANT

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### Statement of Case.

The petitioner was convicted in the County Court in and for the County of Bennington, at the December Term, 1903, of murder in the first degree, and no exceptions having been filed, sentence was imposed by said County Court at said term. The sentence was that the petitioner be confined at hard labor at the State Prison

in Windsor until November 3, 1904, and that on and after November 3, 1904, she should be kept in solitary confinement in said prison until February 3, 1905, and should then be hanged.

On February 1, 1905, the Governor of Vermont reprieved the execution of said sentence until June 2, 1905.

On April 29, 1905, the petitioner presented to two Judges of the Supreme Court of the State of Vermont her petition for a new trial. Said petition is based upon newly discovered evidence and errors claimed to have been committed in the trial in Bennington County. The newly discovered evidence consists of two classes, viz: Evidence tending to show the insanity of the petitioner herself at the time when the crime was committed and showing insanity in her family and among her near relatives; and, second, evidence showing confessions made by the accomplice upon whose testimony petitioner was convicted, to the effect that the testimony so given by him was false, and corroboration of such falsity by the appearance of the body after death, from which it was claimed that the cause of death was entirely different and inconsistent with that claimed at the trial.

The two Judges of the Supreme Court examined and considered said petition, and on May 5, 1905, made an order allowing the same to be filed, and that the same be heard by the Supreme Court on the 10th day of May, 1905, and accordingly said petition was heard on said day by the Supreme Court of the State of Vermont at Montpelier, in the County of Washington, and was

argued by counsel; and thereafter, on the 30th day of May, 1905, a majority of said Court dismissed said petition and refused said new trial, but in so doing no time was fixed for the execution of said sentence, nor was any hearing given thereon by said Court. Neither said two Judges to whom said petition was presented, nor the Supreme Court in which said petition was filed, and which took jurisdiction of the case, ordered any stay of execution of the petitioner.

On June 1, 1905, the Governor of Vermont issued and gave to the defendants an order directing them to execute the the petitioner on June 23, 1905: Then a petition for a writ of *habeas corpus* was filed with the District Court of the United States within and for the State of Vermont on June 19, 1905, and was heard on June 21; and on June 22, the order was made from which this appeal is taken. On the same day, and while the *habeas corpus* proceedings were pending, the Governor of Vermont again issued an order to the defendants commanding them to execute the petitioner on the 8th day of December, 1905. This appeal was allowed on the same day (June 22). During all of the time from November 3, 1904, up to the time of the hearing, the petitioner was held by the officials of the State of Vermont in solitary confinement.

The County Court of the County of Bennington has, by law, original jurisdiction of criminal offenses committed within that County. By the present statute, appellate jurisdiction to review questions raised on the trial is given to the Supreme Court of the State, which

sits only at Montpelier, in the County of Washington. Prior to 1898, the Supreme Court for the County of Bennington had existed by law, and held its sessions in said County of Bennington; Supreme Courts were also established in all the other Counties in the State; but by Act No. 36 of the Laws of 1898, a Supreme Court for all the Counties was required to be held at Montpelier, in the County of Washington. No Supreme Court has since been held or maintained in the County of Bennington.

## Specification of Errors.

The United States District Court for the District of Vermont erred in discharging the writ of *habeas corpus* and remanding appellant to her former custody in the State prison in the County of Windsor in the State of Vermont, and in not discharging appellant from custody.

First: Because the petitioner was and is deprived of her liberty by the State, and subjected to the punishment of solitary confinement without any statute authorizing such punishment, and without any sentence of any Court directing such punishment, and therefore without due process of law.

Second: Because the Supreme Court of Vermont, having taken jurisdiction of the petition for a new trial, and having failed to comply with the requirements of law in respect of ordering a stay of execution and fixing the time for the execution of the petitioner, has failed to fix a day for the execution, and the governor of Vermont has no right or authority to fix such day, and the peti-

tioner is being held to be executed in accordance with a precept not authorized by law, and which is not in and of itself due process of law.

Third: Because the State of Vermont, having failed to maintain an appellate Court in the County of Bennington, as required by its constitution, has deprived the relator of the opportunity to be heard by a Court of competent jurisdiction, and thus deprived her of due process of law.

Fourth: Because the governor of Vermont, having issued his order requiring execution of the petitioner on December 8, while proceedings were pending in the Courts of the United States for her relief on *habeas corpus*, said order of the Governor is to be deemed null and void, and the petitioner should be released from custody thereunder.

## Argument.

### Solitary Confinement.

The petitioner, at the time of the filingof this petition, had suffered the punishment of solitary confinement from November 3, 1904, until June 19, 1905, substantially six and one-half months. She had been sentenced by Bennington County Court in December, 1903, to hard labor until November 3, 1904, and then to solitary confinement until February 4, 1905, on which day she was to be executed.

These facts were conceded in the officers' return on the writ, and are not denied, and are found by the Court as appears from the findings and opinion.

It is, therefore, established, that at the time of filing of this petition, the petitioner had suffered the punishment of solitary confinement for three and one-half months more than the term provided by the sentence of the Court. The Statute which authorized said sentence is Sec. 2007 of Vermont Statutes, which reads as follows:

"When execution is not to take place until after six months from date of sentence, the court at the same time shall sentence the respondent to hard labor in the State prison or house of correction until three months before the time fixed in the sentence of death for execution thereof, and shall also sentence him to solitary confinement in the State prison or house of correction from the expiration of the sentence to hard labor until the time of execution."

Until this statute, the longest term allowed, and the only term allowed, during which the respondent can be punished by solitary confinement, is three months, and that immediately preceding "the time fixed in the sentence of death for execution thereof."

It can not be denied that the petitioner was and is being held by the State of Vermont through its officials, and that she is by them made to suffer a penalty and punishment, both in excess of what the law of the State permits, and of what the sentence of the Court required.

On behalf of the petitioner it is contended that she is deprived of liberty by the State without due process of law. Solitary confinement with the sentence of death is held to constitute, in and of itself, a separate and severe

punishment in addition to being in custody until execution by hanging.

Medley's case, 134 U. S. 160.

The principle laid down in Medley's case applies to this. In that case this Court held the petitioner entitled to relief, because the statute which imposed the punishment of solitary confinement was passed after the crime had been committed, and the petitioner thus deprived of the protection of the provision, in that behalf, of the Constitution of the United States; while here the petitioner shows that she is deprived of liberty, and is being subjected to severe punishment by the State of Vermont without any process whatever, and in violation of the protection granted her by the Fourteenth Amendment of the Constitution of the United States.

The principle involved is the same, though in its application relates to two separate clauses of the Federal Constitution.

It is quite as much an invasion of the rights guaranteed by the Federal Constitution for a State to imprison a person and subject him to severe punishment, without any law, sentence or warrant of commitment authorizing such separate punishment, as it is to prosecute such person under an *ex post facto law*. And whenever a citizen is denied a right guaranteed by the Federal Constitution, or is subjected to a penalty forbidden by it, the Federal courts have jurisdiction and may grant relief.

*Ex parte* Royall, 117 U. S., 241.

The reason for the rule which requires, ordinarily, that proceedings shall be by writ of error and not by *habeas corpus*, does not obtain here. In making this contention, the petitioner does not seek to set aside the judgment of any State court.

## II.

The petitioner is denied due process of law in another respect, viz: That if the time of her execution be the time fixed by the Governor of the State, such time has been fixed without any warrant or authority of law and contrary to law, because the Governor had, by the law of the State, no jurisdiction whatever to so fix it; and the Supreme Court, whose duty it was to fix that time and give the petitioner a hearing thereon, neglected to fix it, and thus refused the petitioner a hearing.

The State statutes here referred to are the following three sections:

"Sec. 1997. When a person is convicted of a capital offense and sentenced to be hanged, he may bring a petition for a new trial at any time before execution of sentence. Such petition shall set forth the grounds for a new trial, and if for newly discovered evidence, the same shall be attached thereto, with a copy of the evidence taken at his trial.

"Sec. 1998. Such petition shall be presented to two judges of the Supreme Court, who, upon examination thereof, shall determine whether it shall be filed, and shall certify their determination thereon; and if the petition is allowed to be filed, the judges shall make an

order staying the execution of sentence until after the time fixed for hearing the petition by the Supreme Court. No adjudication of a former petition shall be a bar to a subsequent one based upon evidence discovered after the former adjudication."

Sec. 1999. Where the trial of the petition does not take place until after the time appointed for execution, if a new trial is refused, the Court hearing the petition shall appoint a time for executing sentence, and issue its order to the sheriff for that purpose."

The case shows that the petitioner brought her petition for a new trial to the State Supreme Court at Montpelier, and that the same was examined by two judges, and allowed by them to be filed, but they made no order staying the execution. The petition was heard and denied by a majority of that Court.

All this was pending the first reprieve by the Governor, which fixed the execution of the petitioner for June 2, 1905. After this the Governor issued his warrant fixing the time of execution June 23d.

By virtue of the statute above quoted, the Supreme Court had jurisdiction of this cause when the petition for a new trial was filed. It was then the duty of the judges to make an order staying execution of sentence, and upon the denial of the petition, *to "appoint a time* for executing sentence." These provisions of the law are mandatory in form. They were entirely disregarded in this case, and consequently the Court, and the only Court that can be said to have had jurisdiction, failed to fix a date for execution as the law required.

It is, therefore, plain that no date is now legally fixed for the execution of the prisoner. The Supreme Court having taken jurisdiction, the sentence of the inferior Court was superseded and vacated so far as the time appointed for execution is concerned if the execution was to take place before the trial occurred in the Supreme Court. The time appointed by the inferior court, was the time fixed, and no other sentence has been given.

If we assume that the Governor had the right to reprieve from the sentence of the Court until June 2, he had no right to reprieve from June 2, nor from any date except such as might be fixed by the Court which, in the meantime, acquired jurisdiction, and no such date was ever fixed. The second and third reprieves are, therefore, entirely null and void, and the petitioner held for execution thereunder is detained without due process of law.

The provision of the Constitution "Nor shall any State deprive *any person* of life, liberty or property, without due process of law" is so plain and comprehensive that it requires no judicial construction. It applies to *any State* and *any person*. What the State does by its officers, it does itself. If the relator is unlawfully held in solitary confinement, and about to be unlawfully executed and put to death by the officers of the State, clothed with authority of the State, and looking to it for justification, then she is being deprived of her liberty and life by the State, and if such acts are without due process of law, it is directly in violation of that constitutional provision. (Art. 14, Sec. 1).

What is due process of law has been many times interpreted by the courts. The definitions given are somewhat conflicting, but it seems to be generally accepted that "law in its regular course of administration through courts of justice, is due process of law." When not so administered, it is not due process of law.

Hurtado *v.* Cal., 110 U. S., 516.

It surely would not be due process of law for a governor of the State to issue his warrant of execution, requiring the death penalty, without trial, conviction and sentence of any court. The right to issue the warrant must come through the recognized channel of an established court. If there is no judgment, sentence or time of execution fixed by a court having jurisdiction, there is nothing from which the governor can reprieve.

In the Storti case, it is stated in the opinion that "the petitioner was sentenced to be put to death at a given time, that he was not then put to death on account of a respite granted by the governor." In this case there was no sentence that she be *put to death at a given time.* The time had lapsed; another court had taken jurisdiction of the case; the sentence was superseded and vacated. *Habeas corpus* to release from imprisonment a person held under a State judgment should be denied without prejudice when the accused has not availed himself of such remedies as the laws of the State offered, but a federal court has jurisdiction to discharge from the custody of said officials *any person* restrained of his liberty in viola-

tion of the Constitution, and may exercise its discretion in the light of the circumstances.

State of Minnesota *v.* Brumdage, 180 U. S. 499, (455).

Markuson *v.* Boucher, 175 U. S., 184 (76).

The Constitution applies to any person. In the Leeper case, the court seems to have limited this provision to "particular persons, or classes of persons." By the use of these expressions, it can hardly be possible that the Supreme Court intended to amend or limit the express words, "any person," to a particular person or class of persons. It surely was intended to apply to any person, rich or poor, white or black, young or old, male or female.

Leeper *v.* Texas, 139 U. S., 462.

The reason of the rule that the court usually refuses to review the decisions of State courts or *habeas corpus* and compel resort to writ of error as stated in the leading case of Baker *v.* Grice, 169 U. S., 284, incidentally touches this case. This is a case of "peculiar urgency;" error is being committed since the judgment of the inferior court has been superseded or vacated by the Supreme Court. It is an attempt of the State by its officers to execute a sentence vacated by the court. There is no action of the court in this regard to which error can be assigned.

Tinsley *v.* Anderson, 171 U. S., 101.

Newport Light Co. *v.* Newport, 151 U. S., 527.

Pepke *v.* Cronan, 155 U. S., 100.

This is one of the cases of so exceptional a nature that this writ is the only course.

*In re* Nagle, 135 U. S., 1.
*In re* Loney, 134 U. S., 372.

The court *in re* Storti, 181 U. S., remarked that "the Federal Constitution neither grants nor forbids the governor of the State the right to stay execution of a sentence." This is true, but the Federal Constitution does forbid the governor of a State to execute a person without a valid sentence of any court.

The fixing of a time of execution is a part of the sentence. The time of execution is of more consequence than any part of it. (Vermont Statutes, 2004).

It would not be due process of law to allow a governor to enter a judgment, fix a penalty and time of execution, and carry that judgment into effect without trial in any court; he may extend, but he may not fix the time of execution.

The only authority vested in the governor is given by Article 8 of the articles of amendment to the Constitution of Vermont, which provides:

"That the supreme executive power of the State shall be exercised by the governor, or in case of his absence or disability, by the lieutenant-governor, who shall have all the powers and perform all the duties vested in and enjoined upon the governor and council by the 11th and 27th sections of the second chapter of the Constitution, as at present established."

And by Sec. 11 of Chapter 2 of the Constitution, which reads as follows:

"The governor, and in his absence the lieutenant-governor with the council, * * * shall have power to grant pardons and remit fines in all cases whatsoever except in treason and murder, in which they shall have power to grant reprieves, but not to pardon until after the end of the next session of the Assembly, and except in cases of impeachment, in which there shall be no remission or mitigation of punishment, but by act of the legislature. They are also to take care that the laws are faithfully executed."

## III.

### Unconstitutional Court.

Sec. 4 of Chapter 2 of the Constitution provides: "That courts of justice shall be maintained in every county in this State, and also in new counties when formed; each court shall be open for the trial of all causes proper for their cognizance, and justice shall be therein impartially administered without corruption or unnecessary delay." * * *

Referring to said section of the Constitution, the Supreme Court in State v. Peterson, 41 Vt., 515, Wilson, J., declared: "By this section of the Constitution relating to County and Supreme Courts, * * * it was and is made the duty and the right of the legislature to create such courts as the interest of the people and the proper administration of justice require." And, on page 518, the Court further says: "The fourth section of the Constitution requires that Supreme and County Courts shall

be maintained, and that these courts shall be open for the trial of all causes proper for their cognizance."

The legislature followed out that provision of the Constitution, established County and Supreme Courts, and provided that:

"Sec. 1007. A County Court shall be held in each county at the times and places appointed by law, consisting of one Chief Judge, who shall be a Judge of the Supreme Court, and two assistant judges, elected by the county, any two of whom shall constitute a quorum."

The legislature further provided:

"Sec. 1010. Each County Court shall have original jurisdiction of prosecutions for criminal offenses within their respective counties except those made cognizable by a justice and may award sentence according to law."

"Sec. 1012. The stated terms of the County Court shall be held each year as follows: In the County of Bennington on the first Tuesday in June and December," etc. * * * (giving times for all counties).

At a stated term of the County Court of Bennington County, in December, 1903, Mary M. Rogers was tried and convicted of murder and sentenced to be hanged February 3, 1905, between the hours of 1 and 2 o'clock in the afternoon.

The legislature, in pursuance of said article of the Constitution, established Supreme Courts, consisting of one Chief Judge and six assistant judges. The law provides:

"Sec. 989. There shall be a Supreme Court for the State, which shall be held at the times and places appointed by law."

"Sec. 990. Such courts shall consist of one Chief Judge and six associate judges, who shall be elected as provided by the Constitution."

"Sec. 993. The Supreme Court shall have exclusive jurisdiction of such petitions not triable by jury as are by law brought before it, and may issue and determine writ of error, *certiorari*, *mandamus*, prohibition and *quo warranto*, and other writs and processes to courts of inferior jurisdiction of corporations and individuals that may be necessary for the furtherance of justice and the regular execution of the laws, and may try and determine questions of law removed from the County Court pursuant to law."

Up to the year 1898 the law provided "That stated terms of the Supreme Court shall be held as follows: (fixing a time in each county), and provided that questions of law may pass to the Supreme Court for a final decision." The law then provided, section 783, Revised Laws: "The stated terms of the Supreme Court shall be held as follows: In the County of Addison on the first Tuesday after the third Monday in January; in the County of Bennington on the second Tuesday next after the fourth Tuesday of January," and so on, fixing a special time in every county in the State.

"Sec. 785—When the parties to any suit pending in the respective County Supreme Court agree in writing that such cause shall be continued to the then next general term of the Supreme Court, such County Supreme Court shall make the necessary order to carry such agreement into effect, provided that this act shall not be considered so as to prevent the County Supreme Court

from continuing any suit therein pending, to such general term."

This section was enacted by No. 21 of the Acts of 1880. It is also provided, Sec. 1623, Vt. Statutes—"Issues of law and questions of law arising upon the trial of an issue of fact by the Court or jury upon the record by the agreement of parties or allowance of Court determined by a County Court may pass to the Supreme Court for final decision."

The Legislature of 1898 passed an Act, No. 36, approved October 31, 1898, "Sec. 2—Three general terms of the Supreme Court for all the counties shall be held as follows: On the fourth Tuesday in January and October and the second Tuesday of May in each year at Montpelier, and special terms may be there held at such other times as the judges appoint. All cases on the docket of the Court in the several counties shall be heard at said stated terms."

This act is unconstitutional and void. Since the passage of this act no Supreme Court has been held in any of the counties except at Montpelier in the County of Washington. If any person convicted of crime in Bennington County, or in any other county in the State, desires to seek relief by the decision or questions of law in the Supreme Court, he must go to Washington County. It deprives the citizen of the United States of the right he had under the Constitution of the State of Vermont to a trial in the only Law Court having cognizance of his case established in the County. The County of Benning-

ton is deprived of a Supreme Court without the citizen consenting to go to Montpelier, a distance of about 200 miles; no other Court is provided or held to take the place of the Supreme Court in Bennington County.

Constitution Vt. Chap. 2, Page 4.
State v. Peterson, 41 Vt. 515.

## Writ of Error Taken Away.

Sec. 1965 V. S. "No writ of error shall be allowed in a criminal cause prosecuted by complaint, information or indictment." This act is also unconstitutional; it takes away the right of every citizen to apply by writ of error to the only Court having jurisdiction to finally determine questions of law arising on the trial of a cause. The County Court has stated terms, and when the County Court adjourned, it adjourned without day, and no provision is made in the law of Vermont to reach the Supreme Court by writ of error or otherwise after the adjournment of the County Court. This is an abridgment of the rights of individuals and deprives a citizen of Bennington County of life, liberty and property without due process of law. The statute compelled this woman to go to Montpelier; it might as well have provided that the Supreme Court be held in New York or San Francisco, and that citizens of Bennington County must go there to try their cases. So far as she is concerned, it was, an illegal tribunal, and had no jurisdiction of her case without her consent. She should not be compelled to resort to that Court. The petition for a new trial shows that there was evidence of her insanity. If she

was insane, as the evidence tended to show, she could not be at fault in not placing upon the record the legal questions raised in the County Court or in not removing her case to the Supreme Court; in the course of the trial. As soon as the County Court adjourned her rights were absolutely cut off by these unconstitutional acts, and she is without redress.

Courts illegally constituted, whose judgment and sentence is void, do not furnish the citizen with due legal process. An indictment in a State Court obtained by unlawful discrimination is void.

Rogers *v.* Alabama, 195 U. S., 257.

The record shows that there is at least good ground for asserting that substantial error was made by the trial court, in that it permitted the accomplice, who testified against the petitioner, to refuse cross-examination; that he did so refuse, and was not cross-examined by reason of such refusal.

The petitioner filed no bill of exceptions in the Bennington County Court, and, by failing so to do, she is, by the law of Vermont, precluded from all remedy for errors by the trial court. She had no Constitutional court to apply to, and by the statute above quoted, she could not, after the adjournment of Bennington County Court, bring any writ of error to any Court whatever.

The rule is well settled that even a sane person can not waive anything in a capital cause.

People *v.* Barberi, 149 N. Y., 256.

Here is a woman claimed to be insane, who was examined by a physician and found to be insane two days before the crime was committed, and yet, by the law of Vermont as above stated, she must waive everything by reason of having failed to file a bill of exceptions during the December Term, 1903, of Bennington County Court.

Statutes which are so far in derrogation of common right can not be regarded as permitting due process of law.

From the very nature of the case it must be apparent that there is no other tribunal in which this question can fairly be raised and fairly tried except in the Federal Courts. The petitioner ought not to be compelled to go to the Supreme Court of the State of Vermont with a claim founded on the illegality of that Court's existence.

If there is a remedy for her, it must be in this Court, and if it is not in this Court, then there is no remedy anywhere, and the failure of this Court to take jurisdiction would amount to a denial of the Constitutional right she claims.

It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the very result of a decision is to deny the rights.

Rogers *v.* Alabama, *supra.*

## IV.

Upon hearing this appeal, the Court will consider the question of the legality of the present detention of the petitioner. She is now held to be executed on December

8 next by virtue of an order of the governor of Vermont made on June 22, at a time when this petition was pending, it having been filed with the District Court on June 19. This order, or reprieve, of the governor was made without the request and against the protest of the petitioner. It is null and void under section 766, Revised Statutes of the United States.

In the brief filed by the appellees in this cause in support of a motion to advance the same, they practically aver that such a reprieve is void by the following statement:

"Further, that since under the Revised Statutes of the United States, section 766, any and every act under and by virtue of the laws and Constitution of the State of Vermont pending this appeal are null and void, the legality of any further reprieve by the governor until this cause is disposed of is doubtful."

The language of the statute is explicit and its meaning seems plain. There can be no question but what the order or reprieve aforesaid is such a proceeding as is covered by section 766, and this being so, the petitioner is now held to be executed by virtue of a proceeding that is made void by a statute of the United States and should be discharged from such unlawful detention.

It is respectfully submitted that the order of the United States District Court, from which the appeal is taken should be reversed.

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